

JENNER & BLOCK LLP  
Richard L. Stone (Bar No. 110022)  
rstone@jenner.com  
Kenneth D. Klein (Bar No. 85231)  
kklein@jenner.com  
Julie A. Shepard (Bar No. 175538)  
jshepard@jenner.com  
633 West 5th Street, Suite 3600  
Los Angeles, CA 90071  
Tel: (213) 239-5100  
Fax: (213) 239-5199

Steven B. Fabrizio (admitted *pro hac vice*)  
sfabrizio@jenner.com  
1099 New York Avenue, NW, Suite 900  
Washington, DC 20001  
Telephone: (202) 639-6000  
Facsimile: (202) 639-6066

Attorneys for Plaintiffs  
Fox Television Stations, Inc.,  
Twentieth Century Fox Film Corp., and  
Fox Broadcasting Company, Inc.

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

FOX TELEVISION STATIONS, INC.,  
TWENTIETH CENTURY FOX FILM  
CORP., and FOX BROADCASTING  
COMPANY, INC.

Plaintiffs,

v.

BARRYDRILLER CONTENT  
SYSTEMS PLC, BARRY DRILLER  
INC., AEREOKILLER, LLC, and  
DOES 1 through 3, inclusive,

Defendants.

Case No. CV12-6921-GW-JC

**PLAINTIFFS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

**[PUBLIC REDACTED VERSION]**

Date: December 6, 2012  
Time: 8:30 a.m.  
Courtroom: 10 - Spring Street Floor

**[Declarations of Sherry Brennan,  
Marsha Reed, Carly Seabrook,  
Rebecca Borden, Samuel Bahun and  
Julie Shepard, Proposed Preliminary  
Injunction Order and Motion to Seal  
filed concurrently herewith]**

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1 Plaintiffs<sup>1</sup> respectfully submit this memorandum of points and authorities in  
 2 support of their motion for a preliminary injunction prohibiting Defendants  
 3 Aereokiller LLC, BarryDriller, Inc., and Barry Driller Content Systems Plc  
 4 (collectively, “Aereokiller” or “Defendants”) from retransmitting Plaintiffs’ over-  
 5 the-air broadcasts via the Internet, web applications, portable devices, or any other  
 6 method without Plaintiffs’ authorization in violation of the Copyright Act.

## 7 **I. INTRODUCTION**

8 This Motion does not present new or difficult legal issues: Courts have  
 9 repeatedly enjoined unlicensed commercial services that stream copyrighted  
 10 works, including broadcast television programming, over the Internet. While an  
 11 individual can receive broadcast television over the airwaves for free, a business  
 12 such as Aereokiller’s that retransmits television broadcasts over the Internet is  
 13 engaged in a “public performance” of those television programs under the  
 14 Copyright Act. Because Plaintiffs have the exclusive right to publicly perform  
 15 their works and Aereokiller has no license from any network to retransmit their  
 16 programs over the Internet, Aereokiller should be enjoined from infringing  
 17 Plaintiffs’ copyrights through its FilmOnX website and service, or otherwise.

18 Indeed, Judge Buchwald in the Southern District of New York entered a  
 19 temporary restraining order in 2010 which was converted to a permanent  
 20 injunction on August 9, 2012 that permanently enjoined Aereokiller’s sister  
 21 company and part owner, FilmOn.com Inc., from streaming over the Internet the  
 22 broadcasts of the four television networks through the FilmOn service and website.

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23  
 24 <sup>1</sup> Plaintiffs consist of Fox Television Stations, Inc., Twentieth Century Fox Film  
 25 Corporation, and Fox Broadcasting Company, Inc. (collectively, “Fox”) in the  
 26 above-captioned action, along with NBCUniversal Media, LLC, Universal  
 27 Network Television, LLC, Open 4 Business Productions LLC, NBC Subsidiary  
 28 (KNBC-TV) LLC, Telemundo Network Group LLC, WNJU-TV Broadcasting  
 LLC, American Broadcasting Companies, Inc., ABC Holding Company Inc.,  
 Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc. and Big Ticket  
 Television, Inc. in the related *NBCUniversal* action. An identical Motion is being  
 filed in each action.

FilmOnX is simply a reincarnation of the enjoined FilmOn service. Given the clear dictates of the Copyright Act, and the existing injunction, the Court may wonder what possesses Aereokiller to believe its FilmOnX service should not be enjoined while the virtually identical FilmOn service was permanently enjoined just months ago. According to Aereokiller ( [REDACTED] ), it should not be enjoined because its technology is supposedly like the competing Aereo service and a different District Court Judge in the Southern District of New York refused to preliminarily enjoin that service.<sup>2</sup>

Aereokiller's claim that its purported attempt to emulate the technology used by Aereo exempts it from the Copyright Act in this District fails for multiple reasons. *First*, a decision by another District Court in a different circuit applying the *Cablevision* case,<sup>3</sup> which is not controlling, to deny a preliminary injunction for a different service on a different record is irrelevant. This is especially true since Aereo has limited its service to the greater New York area specifically to stay within the confines of the reach of the *Cablevision* decision. *Second*, and more fundamentally, the Copyright Act is expressly technology agnostic and prohibits the public performance of a work by a transmission to the public "by means of any device or process." 17 U.S.C. § 101. In other words, Congress intended that a service such as Aereokiller's that makes Plaintiffs' copyrighted works available to its subscribers must have a license irrespective of any technological gimmickry to deliver the programming to its subscribers. *Third*, and not surprisingly, the District Court's decision in *Aereo* is an outlier among several decisions enjoining commercial services that retransmit copyrighted works over the Internet. Indeed, Aereokiller's sister company was enjoined in 2010 and stipulated to entry of a

<sup>2</sup> As Plaintiffs believe their motion for a preliminary injunction against Aereo was incorrectly decided, they have filed an expedited appeal of the *Aereo* decision, which is set for oral argument on November 30, 2012.

<sup>3</sup> *Cartoon Network, LP LLLP v. CSC Holdings, Inc.* ("Cablevision"), 536 F.3d 121 (2d Cir. 2008).

1 consent judgment and permanent injunction of the FilmOn service after the *Aereo*  
2 decision. *Fourth*, Aereokiller's claim fails as a factual matter and must be viewed  
3 with great skepticism since [REDACTED]

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]. Aereokiller  
8 cannot have it both ways. It cannot assert an "Aereo" defense (on which it bears  
9 the burden of proof) while withholding the technical discovery necessary to test  
10 that defense.

11 Aereokiller's copyright infringement must be enjoined to prevent irreparable  
12 injury to Plaintiffs. As content owners and broadcasters, Plaintiffs' businesses  
13 depend on their ability to control where, when and how their programming is  
14 distributed to consumers. Aereokiller's unauthorized streaming of Plaintiffs'  
15 programming rips that control from Plaintiffs, threatens their core business models,  
16 destroys their leverage in critical distribution negotiations, harms their ability to  
17 expand into new markets, and interferes with Plaintiffs' goodwill with licensed  
18 distributors and advertisers.

19 The harms inflicted by Aereokiller are inherently difficult to measure and  
20 cannot be remedied by an award of damages, especially because Aereokiller may  
21 never be able to pay the significant statutory damages authorized by the Copyright  
22 Act for what will amount to willful infringement of thousands of separate works.  
23 Moreover, unless enjoined, Defendants' model for infringement will be imitated by  
24 others, further exacerbating the harm to Plaintiffs. These exact harms formed the  
25 basis for courts in the Ninth Circuit to enjoin unauthorized Internet streaming of  
26 entertainment programming.<sup>4</sup> And, the Second Circuit recently reaffirmed this

27 <sup>4</sup> See, e.g., *WTV Systems*, 824 F. Supp. 2d at 1012-14 (analyzing numerous  
28 forms of irreparable harm threatened by unauthorized Internet transmissions of



conclusion in its detailed analysis of the irreparable harms caused by unauthorized Internet streaming of Plaintiffs' broadcasts such as those at issue here.<sup>5</sup>

## II. STATEMENT OF FACTS

### A. Plaintiffs And Their Copyrighted Programming

Plaintiffs are companies that, among other things, produce and license the distribution of television programs and other copyrighted works that appear on the Fox, NBC, ABC, and CBS television networks. Plaintiffs invest significant resources in the development, acquisition and production of this programming, which includes such popular programs as *Glee* (FOX), *The Office* (NBC), *Grey's Anatomy* (ABC), and *The Good Wife* (CBS) that are broadcast on network-affiliated television stations. Plaintiffs own the copyrights in these and other programs that are broadcast on their respective television networks. Declaration of Sherry Brennan ("Brennan Decl."), ¶ 2; *see* Declaration of Marsha Reed ("Reed Decl."), ¶¶ 4-5, Exs. 1, 2; Declaration of Carly Seabrook ("Seabrook Decl."), ¶ 2, Exs. 1, 2; Declaration of Rebecca Borden ("Borden Decl."), ¶¶ 4-5, Exs. 1, 2. Plaintiffs also own and operate numerous local broadcast television stations that are actively engaged in the distribution of their programs throughout the United States. Brennan Decl., ¶¶ 3-4.

Plaintiffs' copyrighted television programming is offered directly to the public free of charge via over-the-air broadcasts. The latest reports reflect that nearly 54 million Americans rely on over-the-air broadcasts (not cable or satellite) to receive television. *Id.* ¶ 3, Ex. B.

Plaintiffs' broadcasts are also distributed via cable and satellite by various cable television companies and satellite television services, such as Time Warner

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plaintiffs' movies).

<sup>5</sup> *WPIX, Inc. v. ivi, Inc.* ("ivi"), 691 F. 3d 275, 85-87 (2d Cir. 2012) (describing the litany of irreparable harms caused by unlicensed Internet retransmissions of broadcast television).



Cable, DirecTV, and Comcast, pursuant to retransmission consent agreements. *Id.*  
 ¶ 4. Under federal communications law, cable and satellite television providers  
 must obtain a broadcast network's consent to retransmit the network's signal to  
 subscribers (*see* 47 U.S.C. § 325(a)), which they do through negotiations with  
 Plaintiffs.

Plaintiffs have also entered into other arrangements regarding the  
 distribution of their programming over different media (*e.g.*, the Internet or digital  
 downloads) and/or on a delayed basis. *Id.* ¶¶ 18-19. For example, many of the  
 Plaintiffs license their content on a time-delayed basis to companies such as Hulu  
 (in which some Plaintiffs have an ownership interest) for distribution on Hulu.com  
 and Apple for distribution through iTunes. *Id.* ¶ 19. Certain Plaintiffs and  
 affiliated companies also offer their own mobile TV offerings, including Dyle.tv,  
 which is part of a joint venture between NBCUniversal and Fox, and ABC's soon-  
 to-be launched "Watch" services. *Id.* ¶ 22.

#### **B. FilmOnX Is An Unauthorized Internet Streaming Service**

Plaintiffs have not granted Aereokiller any license to their copyrighted  
 programming. Brennan Decl., ¶ 6. Nevertheless, on or about August 7, 2012,  
 Aereokiller began streaming over the Internet<sup>6</sup> the local television stations  
 affiliated with the Fox, NBC, ABC, and CBS networks -- and Plaintiffs'  
 copyrighted programming on those stations -- in the Los Angeles, Chicago, New  
 York and Minneapolis markets. Declaration of Julie Shepard ("Shepard Decl."),  
 ¶ 2; Declaration of Samuel Bahun ("Bahun Decl."), ¶¶ 3-8. Sometime in  
 September 2012, Defendants expanded their service to include streaming the local  
 broadcast channels from Dallas and San Francisco. Shepard Decl., ¶ 2.

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<sup>6</sup> As explained by the *ivi* court, "[s]treaming" generally involves compressing a  
 file to a size small enough to be transmitted over the Internet and then allowing the  
 receiving computer to start playing packets of the file while the remaining packets  
 are being transmitted." *ivi*, 691 F.3d at 277, n.1, citing Preston Galla, How the  
Internet Works, 229-31 (7th ed. 2004).

1 Aereokiller's streaming service was originally made available to the public  
 2 at www.barrydriller.com. After Aereokiller lost a legal battle with media  
 3 executive Barry Diller over the use of the "Barry Driller" name,<sup>7</sup> Aereokiller  
 4 changed its service to "FilmOnX" and began redirecting subscribers from  
 5 www.barrydriller.com to www.filmonx.com, where it continues to operate the  
 6 infringing service. *See id.* ¶ 2, Ex. M (257:25-258:15); *Barry Diller v. Barry*  
 7 *Driller Content Systems, Plc.*, Case No. 2:12-CV-7200-ABC-JC, Dkt. Nos. 11, 24  
 8 & 25. In the latter half of October, notwithstanding the pendency of this Action,  
 9 Aereokiller again expanded its infringing service and began making Plaintiffs'  
 10 local broadcasts available over the www.filmon.com website, in addition to  
 11 www.filmonx.com. Shepard Decl. ¶ 2, Ex. M (257:25-258:15); Bahun Decl. at ¶ 7.

12 Aereokiller also started retransmitting Plaintiffs' local broadcast via Internet  
 13 "apps" compatible with iPhones, Android phones, Facebook and Microsoft's  
 14 Windows 8. Shepard Decl., ¶¶ 2, 8, 17, Exs. C, D, K. Aereokiller's widened  
 15 distribution web threatens to substantially expand its current unauthorized  
 16 distribution of Plaintiffs' programming by making Aereokiller's infringing service  
 17 available to tens of millions of more users. *See*, Section III.C., *infra*.

18 Aereokiller derives financial benefit from the retransmission of Plaintiffs'  
 19 over-the-air broadcasts in several ways. First, it charges fees to its subscribers (1)  
 20 to receive the unauthorized retransmissions of network and local programming on  
 21 the local Fox, NBC, ABC and CBS affiliates, as well as other local stations, in  
 22 High Definition to be watched live and (2) to copy Plaintiffs' programming for  
 23 later viewing. Shepard Decl., ¶¶ 11-12, Exs. F, G, M (43:10-18). And, while  
 24

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25 <sup>7</sup> Barry Diller is a well-known media executive and investor in Aereo, another  
 26 unauthorized Internet retransmission service that Plaintiffs have sued in New York.  
 27 Mr. Diller sued Aereokiller in the Central District of California for misuse of his  
 28 name shortly after launch of the barrydriller.com website. Defendants have been  
 preliminarily enjoined from using "Barry Driller" or any close iteration thereof.  
*Barry Diller v. Barry Driller Content Systems, Plc.*, Case No. 2:12-cv-7200 ABC  
 (JC), Dkt. Nos. 11, 24 & 25.

1 Aereokiller does not charge users to watch Plaintiffs' broadcasts live in standard  
 2 definition, it commercially capitalizes on such retransmissions through advertising.  
 3 *Id.* ¶¶ 13-16, Exs. H, I, J. Aereokiller airs 10-30 second advertising spots that a  
 4 FilmOnX user will see immediately after they select one of Plaintiffs' channels.  
 5 The user will first be forced to watch the advertising before Plaintiffs'  
 6 programming appears. *Id.* ¶ 14, Ex. H and Ex. M (43:22- 44:2). *See also*, Brennan  
 7 Decl., ¶ 23. Advertising companies pay Defendants, not Plaintiffs, for these  
 8 advertisement spots. Brennan Decl., ¶ 23. Aereokiller also advertises its own  
 9 programs and affiliated services (*e.g.*, *Situation TV*, *Battle CAM Community TV*,  
 10 *Natalie Nunn Live*, FilmOn.tv) through banner ads strategically placed directly  
 11 above its unauthorized display of Plaintiffs' broadcasts. Shepard Decl., ¶ 15, Ex. I.  
 12 Finally, in an effort to trade unfairly on an unlicensed association with Plaintiffs'  
 13 popular programming, Aereokiller prominently displays its "FilmOnX" logo in a  
 14 corner of the screen on which Plaintiffs' programs are exhibited. *Id.* ¶ 16, Ex. I, J.

15 **C. FilmOnX Is A Reincarnation Of An Unauthorized Streaming Service**  
 16 **Enjoined Since 2010 And Its "Aereo" Technology Defense Is**  
 17 **Specious And Unsupported By The Facts**

18 Aereokiller appeared for a limited 30(b)(6) deposition on November 1, 2012.  
 19 Shepard Decl., ¶ 19. During the course of the deposition, it became clear that  
 20 Aereokiller is hiding the ball from Plaintiffs, and ultimately this Court.

21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]  
 26 [REDACTED]  
 27 [REDACTED]  
 28 [REDACTED]

1 Shepard Decl., ¶ 19, Ex. M (60:4-61:1). In September 2010, one of Mr. David's  
 2 companies launched FilmOn -- another website that also streamed Plaintiffs' over-  
 3 the-air broadcasts without permission. Plaintiffs immediately sued FilmOn in the  
 4 United States District Court for the Southern District of New York and won a  
 5 temporary restraining order, enjoining its infringing retransmissions. *See CBS*  
 6 *Broad., Inc. v. FilmOn.com, Inc.* ("FilmOn"), Case No. 1:10-cv-7532-NRB, Dkt.  
 7 No. 8 (Nov. 22, 2010); Shepard Decl., Ex. S. The case was resolved by way of a  
 8 consent judgment, entered on August 8, 2012, that permanently required FilmOn to  
 9 stop streaming Plaintiffs' copyrighted programming (the "FilmOn Injunction"). *Id.*  
 10 Ex. M (234:16-235:5, Depo. Ex. 7).

11 Within a day of the entry of the FilmOn Injunction, Aereokiller launched  
 12 www.barrydriller.com to stream the network broadcasts over the Internet. *Id.*;  
 13 Shepard Decl., ¶ 2. Aereokiller endeavored to publicly associate itself as closely  
 14 as possible with a different Internet streaming service called Aereo that is located  
 15 in Brooklyn to give the false impression that Defendants' Internet streaming  
 16 service is an analog to Aereo and employs the same technology. Aereo uses  
 17 antenna boards with hundreds of tiny antennas that capture Plaintiffs' over-the-air  
 18 broadcasts and the resulting digital signals are then routed through a hard drive  
 19 with DVR functionality to "play back" the broadcasts over the Internet to Aereo  
 20 subscribers. Aereokiller wants to be associated with Aereo and its technology  
 21 because a court in the Southern District of New York declined in July 2012 to  
 22 preliminarily enjoin Aereo's unauthorized streaming service because of the  
 23 technology Aereo employs even though the court recognized the irreparable harm  
 24 this was causing the broadcast companies, who are Plaintiffs here. *See ABC v.*  
 25 *Aereo, Inc.* ("Aereo"), 2012 WL 2848158 (S.D. N.Y. July 11, 2012), *appeal*  
 26 *pending*.

27 To create the association with Aereo, Aereokiller not only chose a corporate  
 28 name incorporating "Aereo," but also described its service as employing "tons" of

1 antennas that are “so tiny” that one will “fit on the tip of your finger” with servers  
 2 in a “Brooklyn facility.” Shepard Decl., Ex. M (86:20-87:19, Ex. 1).<sup>8</sup> Aereokiller  
 3 also chose to launch its service using the domain name BarryDriller.com, a play on  
 4 the name of Barry Diller, a well-known backer of Aereo, and also displayed the  
 5 corporate names BarryDriller Inc. and Barry Driller Content Systems Plc on  
 6 Aereokiller’s website. *Id.*<sup>9</sup> Aereokiller only started using filmonx.com after being  
 7 enjoined from using barrydriller.com. *Id.*

8 [REDACTED]  
 9 [REDACTED] *Id.* (67:16-69:14); Bahun Decl., ¶ 7.<sup>10</sup>  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]

14 <sup>8</sup> [REDACTED]. *Id.*  
 15 (86:13-87:17, Depo. Ex. 1).

16 <sup>9</sup> [REDACTED]. *Id.* (53:3-16).

17 <sup>10</sup> When questioned during the 30(b)(6) deposition [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]. *See* Shepard Decl., Ex. M (234:25-235:5, 243:6-244:16, Ex 7).

20 <sup>11</sup> As this Court is aware, Aereokiller has resisted efforts of Plaintiffs to take  
 21 discovery regarding Aereokiller’s technology. Shepard Decl., ¶ 20. In response to  
 22 requests for expedited discovery, Aereokiller opposed Plaintiffs’ technology  
 23 discovery requests, asserting that such discovery was “not relevant” to a  
 24 preliminary injunction motion. *Id.* ¶ 20. This Court declined to order expedited  
 25 technology related discovery because it was not clear that an Aereo defense would  
 26 be raised by Aereokiller *or* that “such an opposition had a colorable chance of  
 27 convincing the Court of its merit in the face of the unauthorized conduct that gave  
 28 rise to this litigation.” Dkt. No. 33(Fox action), Dkt. No. 29 (NBCUniversal  
 action). Further, even though Aereokiller later stipulated that it would respond  
 (subject to its objections) to all of Plaintiffs’ expedited discovery requests,  
 Aereokiller refused to provide any documents that would reveal how its technology  
 actually functions, how many tiny antennas it purportedly has deployed, and where  
 they are located. Shepard Decl., ¶ 20, Ex. N. Plaintiffs warned Aereokiller that if  
 no technology documents were provided, they would move to exclude them if  
 submitted in opposition to a preliminary injunction motion. Shepard Decl., ¶¶ 20-  
 22 To date, no technology documents have been provided. *Id.* While Plaintiffs  
 believe that even if FilmOnX adopted the Aereo technology it would still be

*Id.* (117:25-118:11, 207:5-213:3).

*Id.* (25:20-26:12, 27:15-28:23).

*Id.* (96:10-100:1, 101:19-102:6, 106:3-17, 108:20-109:19, 111:7-12).

Aereokiller's refusal to provide the details of its technology reveals that its "Aereo-like" defense is pure fabrication. In any event, employing Aereo's technology is no defense to a copyright infringement claim. As with the FilmOn entities and filmon.com, Aereokiller and FilmOnX are engaged in unauthorized retransmissions of Plaintiffs' copyrighted works and should be enjoined.

### **III. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION**

Plaintiffs may obtain a preliminary injunction by establishing that they are "likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def.*

illegally publicly performing their copyrighted works, Defendants clearly believe their sole excuse to civil copyright liability is the architecture of their technology. Thus, it is telling that Defendants still refuse to provide, under oath, the information that would verify if this is true.



1 *Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, an injunction also should issue  
 2 if Plaintiffs show “serious questions going to the merits” and a “balance of  
 3 hardships that tips sharply towards the plaintiff[s],” so long as Plaintiffs “also  
 4 show[] that there is a likelihood of irreparable injury and that the injunction is in  
 5 the public interest.” *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,  
 6 1134-35 (9th Cir. 2011); *WTV Systems*, 824 F. Supp. 2d at 1008.

#### 7 **A. Plaintiffs Are Likely To Succeed On The Merits**

8 To establish copyright infringement, a plaintiff must show (1) ownership of  
 9 a valid copyright and (2) violation by the defendant of any of one of the five  
 10 exclusive rights granted to copyright owners under 17 U.S.C. § 106. *A&M*  
 11 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001); *WTV Systems*,  
 12 824 F. Supp. 2d at 1008. Plaintiffs easily satisfy both of these requirements. *First*,  
 13 Plaintiffs own the copyrights to the programs that Defendants are unlawfully  
 14 streaming over FilmOnX. *See* Brennan Decl., Ex. A; Reed Decl., Ex. 2; Borden  
 15 Decl., Ex. 2; Seabrook Decl., ¶ 2, Ex. 2. *Second*, as explained below, Defendants  
 16 are violating Plaintiffs’ exclusive right to perform their copyrighted works publicly  
 17 and to authorize others to do so. *See* 17 U.S.C. § 106(4).

18 The Transmit Clause of the Copyright Act gives copyright owners such as  
 19 the broadcast company plaintiffs here “exclusive rights . . . to authorize the public  
 20 display of [their] copyrighted content, including the retransmission of [their]  
 21 broadcast signal[s].” *ivi*, 691 F.3d at 278 (quoting *EchoStar Satellite L.L.C. v.*  
 22 *F.C.C.*, 457 F.3d 31, 33 (D.C. Cir. 2006)) (alterations and ellipses in original;  
 23 internal quotation marks omitted); *accord*, *WTV Systems*, 824 F. Supp. 2d at 1008-  
 24 10; *Twentieth Century Fox Film Corp. v. iCraveTV* (“*iCraveTV*”), 2000 WL  
 25 25989, at \*7 (W.D. Pa. Feb. 8, 2000). As the *ivi* court recognized, retransmitting  
 26 over-the-air television broadcasts via the Internet to subscribers, as Defendants do,  
 27 constitutes a “public performance” that must be licensed by the copyright owners  
 28 and constitutes infringement if it is not. *ivi*, 691 F.3d at 278.



Under the Transmit Clause, a party publicly performs a work when it (1) transmits a performance of the work (2) to the public (3) by means of any device or process – regardless of “whether the members of the public ... receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101; *see also*, *WTV Systems*, 824 F. Supp. 2d at 1009-1010. By streaming Plaintiffs’ broadcasts over FilmOnX, Defendants (1) retransmit copyrighted programming over the Internet (2) to any member of the public who wishes to use or subscribe to their service (3) by means of Defendants’ system for capturing over-the-air broadcasts and streaming those broadcasts over the Internet to subscribers. Defendants’ unauthorized retransmissions of Plaintiffs’ television broadcasts therefore violate Plaintiffs’ public performance rights, even if different viewers receive the transmission in separate places and at different times. *See*, *e.g.*, *WTV Systems*, 824 F. Supp. 2d at 1008-09; *iCraveTV*, 2000 WL 25989, at \*7; *accord*, *ivi*, 691 F.3d at 279, 284-85.

The Copyright Act also is clear that a work is performed publicly (thus requiring a license from the copyright holder) if a performance of the work is transmitted to the public “by means of any device or process.” 17 U.S.C. § 101. For the purpose of determining whether a performance is to the public, it does not matter whether the transmitter uses a process that involves one antenna or multiple antennas or transmits from a master copy or unique copies. The fact that Congress intended to capture all possible technologies within the definition of public performance is underscored by the statute’s definition of “device or process” which includes one “now known or later developed.” *Id.* As Congress made clear:

The definition of “transmit” . . . is broad enough to include *all conceivable forms and combinations of wires and wireless communications media*, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission,’ and *if the*

1        *transmission reaches the public in any form*, the case comes within  
 2        the scope of [the statute].

3        H.R. Rep. 94-1476 at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678 (emphasis  
 4        added).

5        The proposition that the unauthorized retransmission of television broadcasts  
 6        over the Internet infringes the public performance rights of copyright holders is  
 7        hardly novel. As far back as 2000, the court in *iCraveTV* considered a challenge to  
 8        an Internet service that captured over-the-air television broadcasts, converted the  
 9        signals into computerized data, and streamed copyrighted programming to  
 10       subscribers over the defendant's website. 2000 WL 25989, at \*2. Granting a  
 11       preliminary injunction, the court held that the plaintiffs were likely to succeed on  
 12       their copyright claims because defendants were "unlawfully publicly performing  
 13       plaintiffs' copyrighted works ... by transmitting (through use of 'streaming'  
 14       technology) performances of the works to the public by means of the telephone  
 15       lines and computers that make up the Internet." *Id.* at \*7. Defendants conduct  
 16       here is indistinguishable from the infringing conduct by iCraveTV.

17       Over the 12 years between *iCraveTV* and the near-identical holding in *ivi*,  
 18       courts applying the Transmit Clause in the online context have repeatedly  
 19       reaffirmed the conclusion that Internet transmissions and retransmissions of  
 20       protected works to multiple individuals – even in different places and at different  
 21       times – are public performances that require the consent of the copyright owners.  
 22       *See FilmOn.com*, No. 1:10-cv-7532-NRB, Dkt. No. 8 (Nov. 22, 2010) (TRO  
 23       enjoining Internet retransmissions of Plaintiffs' over-the-air television broadcasts  
 24       as unauthorized public performances); *Live Nation Motor Sports, Inc. v. Davis*, No.  
 25       3:06-CV-276-L, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007) (audio webcasts of  
 26       Supercross event infringe the public performance right); *Video Pipeline, Inc. v.*  
 27       *Buena Vista Home Entm't, Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002)  
 28       (transmissions of video clips from motion pictures over the Internet are public

1 performances), *aff'd on other grounds*, 342 F.3d 191 (3d Cir. 2003). The  
2 Copyright Office shares the view that performances of works over the Internet are  
3 to the public and must be licensed by the copyright owner. *See ibi* at 283-84.

4 These basic principles were reaffirmed within the Ninth Circuit as recently  
5 as last year when the *WTV Systems* court held that unauthorized transmission of  
6 copyrighted videos over the Internet violates the copyright holders' public  
7 performance rights. 824 F. Supp. 2d at 1008. In *WTV Systems*, the defendants  
8 provided a DVD "rental service" called Zediva over the Internet. The defendants  
9 purchased hundreds of DVDs and DVD players. *Id.* at 1006-07. Upon the  
10 customer's request, the defendants would assign a DVD player to the customer,  
11 insert a DVD of the movie requested, convert the signal to a form suitable for  
12 streaming over the Internet, and transmit the performance via the Internet to the  
13 customer. *Id.* at 1007. The defendants tried to claim that they were merely a rental  
14 service and were not transmitting a performance to the public via their Internet site.  
15 The *WTV Systems* court flatly rejected this and held that: "Defendants are  
16 violating Plaintiffs' exclusive right to publicly perform their Copyrighted Works  
17 by transmitting those Works to the public over the Internet, without a license or  
18 Plaintiffs' permission, through the use of Zediva's service." *Id.* at 1008.

19 Like the defendants in *iCraveTV*, *ivi* and *FilmOn.com*, Defendants in this  
20 case are capturing Plaintiffs' over-the-air broadcasts and copyrighted  
21 programming. And, like the defendants in *iCrave*, *WTV Systems*, *ivi*, and  
22 *FilmOn.com*, Defendants are retransmitting Plaintiffs' programming to the public  
23 over the Internet without the copyright holders' authorization. Accordingly, like  
24 the defendants in these cases, Defendants should be enjoined because Plaintiffs are  
25 likely to succeed on the merits of their claim that the FilmOnX service violates  
26 Plaintiffs' public performance rights under Section 106 of the Copyright Act.  
27 Indeed, this is particularly true because, as explained above, FilmOnX appears to  
28 be just a reincarnation of the [www.filmon.com](http://www.filmon.com) website enjoined in *FilmOn.com*.

1 Aereokiller cannot avoid an injunction with its purported attempt to replicate  
2 the Aereo service. This is especially true since Aereo has limited its service to the  
3 greater New York area specifically to stay within the confines of the reach of the  
4 *Cablevision* decision, while FilmOnX is streaming in Los Angeles and San  
5 Francisco, among other places. Neither the Second Circuit's decision in  
6 *Cablevision*, nor the District Court's decision in *Aereo* reluctantly following  
7 *Cablevision*, is controlling here. *See, e.g., Gunther v. Washington County*, 623  
8 F.2d 1303, 1319 (9th Cir. 1979) (noting that the court is "bound only by decisions  
9 rendered in this circuit."). Indeed, the District Court's decision in *Aereo* is an  
10 outlier and runs counter to the numerous cases cited above and fundamental  
11 copyright law. In particular, *Aereo* is inconsistent with this District's ruling in  
12 *WTV Systems*, which held that assignment of a dedicated DVD player to a user and  
13 the subsequent transmission of the video stream from that DVD player to a user  
14 over the Internet violated the public performance right. *WTV Systems*, 824 F.  
15 Supp. 2d at 1008. Aereokiller's alleged use of individual antennas for each of its  
16 users substantively is no different than the dedicated DVD players at issue in *WTV*  
17 *Systems*, and should be treated the same under the Copyright Act.

18 Further, as noted above, the Copyright Act is expressly technology agnostic.  
19 It prohibits the public performance of a work by a transmission to the public "*by*  
20 *means of any device or process.*" 17 U.S.C. § 101 (emphasis added). By these  
21 words, Congress intended that a service such as Aereokiller's that makes another's  
22 copyrighted works available to its subscribers must have a license to do so,  
23 irrespective of the method by which programming is made available. Whether  
24 FilmOnX uses one antenna or many, it delivers a service indistinguishable from  
25 those enjoined in *ivi* and *FilmOn* and, like the service in *WTV Systems*, uses the  
26 Internet to publicly perform Plaintiffs' copyrighted content.

27 Finally, Aereokiller's claim that it is "Aereo-like" must be viewed with great  
28 skepticism and accorded no weight given [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]. Aereokiller cannot invoke a technical defense, on which it  
 4 bears the burden of proof, based entirely on information within its exclusive  
 5 control, while withholding the technical data necessary to test the applicability of  
 6 that defense.<sup>12</sup> Regardless, because the Transmit Clause is technology agnostic,  
 7 *Aereo* provides no defense at all.

### 8 **B. Plaintiffs Will Suffer Irreparable Harm Absent An Injunction**

9 Plaintiffs are broadcasters and copyright owners, whose businesses depend  
 10 on their “exclusive right to decide when, where, to whom and for how much they  
 11 will authorize transmission of their [c]opyrighted [programming] to the public.”  
 12 *WTV Systems*, 824 F. Supp. 2d at 1012. Plaintiffs possess a “property interest in  
 13 the copyrighted material” and will suffer harm to that “legal interest” that “cannot  
 14 be remedied after a final adjudication,” if Defendants’ unauthorized retransmission  
 15 of their broadcasts is not enjoined. *Salinger v. Colting*, 607 F.3d 68, 81 & n.9 (2d  
 16 Cir. 2010); see *Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp.  
 17 2d 1197, 1210 (C.D. Cal. 2007).

18 In copyright cases, courts have held that irreparable harm is established  
 19 where an infringing defendant’s activities threaten to impair a copyright owner’s  
 20 control over its copyrighted works, threaten the goodwill and business reputation  
 21 of the plaintiff, or threaten to cause loss of business or business opportunities. See,  
 22 e.g., *ivi*, 691 F.3d at 285-87; *WTV Systems*, 824 F. Supp. 2d at 1012-13. The *ivi*

23  
 24 <sup>12</sup> Aereokiller also cannot rely on conclusory and self-serving testimony while  
 25 withholding the actual technical data necessary to prove or disprove Mr. David’s  
 26 assertions. Such testimony [REDACTED]

26 [REDACTED] is inadmissible. See *United States v. Bennett*, 363 F.3d  
 27 947, 953 (9th Cir. 2004) (best evidence rule barred testimony regarding GPS data  
 28 where “the government did not produce the GPS itself -- or a printout or other  
 representation of such data”); accord, *Lynchval Sys., Inc. v. Chicago Consulting  
 Actuaries, Inc.*, No. 95-C-1490, 1998 WL 151814, at \*6 (N.D. Ill., Mar. 27, 1998).



1 and *WTV Systems* decisions, in particular, described the multiple, irreparable harms  
 2 caused by unlicensed streaming of copyrighted television and video programming  
 3 over the Internet. As the accompanying declaration of Sherry Brennan further  
 4 establishes, FilmOnX's unauthorized Internet streaming of Plaintiffs' broadcasts  
 5 threatens to damage Plaintiffs' intellectual property and their businesses in at least  
 6 the following ways recognized by those case as irreparable harm:

7 ***Damaging Plaintiffs' Ability to Negotiate Retransmission Consent***

8 ***Agreements.*** Defendants' unauthorized streaming of Plaintiff's television  
 9 programming over the Internet threatens to damage Plaintiffs' ability to negotiate  
 10 favorable retransmission consent agreements with cable, satellite and  
 11 telecommunications providers, such as Time Warner Cable, DirecTV and Verizon,  
 12 who legitimately retransmit Plaintiffs' broadcasts. *See ibi*, 691 F.3d at 285; *see*  
 13 *also*, Brennan Decl., ¶¶ 15-17.

14 Revenues from retransmission consent licensing have become increasingly  
 15 important to the broadcast industry, and are used to fund the development and  
 16 acquisition of broadcast programming. *ibi*, 691 F.3d at 285; *see also*, Brennan  
 17 Decl., ¶ 15. Unauthorized services like FilmOnX threaten to undermine the value  
 18 of these retransmission rights because they steal Plaintiffs' live programming and  
 19 retransmit it at the same time as cable and satellite companies that pay Plaintiffs  
 20 for those rights, which could lead these companies to demand concessions if free-  
 21 riders like Defendants exploit them without paying.<sup>13</sup> *ibi*, 691 F.3d at 285;

22 <sup>13</sup> [REDACTED]  
 23 [REDACTED]. *See* Shepard Decl., Ex. M (251:18-25). However, such a restriction  
 24 is solely in its control and could be lifted at Aereokiller's whim. If it were,  
 25 Plaintiffs' broadcasts that Aereokiller is capturing in six local markets would  
 26 become available nationally. As a result, a person in Seattle, for example, would  
 27 be able to use FilmOnX to view a program broadcast on a New York station hours  
 28 ahead of the same program's scheduled airing on one of the Plaintiffs' local Seattle  
 channels. The *ibi* court found the interference with the time restrictions in  
 plaintiffs' licenses to be another factor that undermined their negotiations and  
 relationships with licensees and advertisers and diminished the value of the their  
 programming, thereby causing irreparable harm. 691 F.3d at 285-86.

1 *accord, WTV Systems*, 824 F.Supp. 1003; *see also*, Brennan Decl., ¶¶ 15-17.

2 In addition, the harm to Plaintiffs' ability to negotiate retransmission consent  
3 contracts is compounded because Defendants' service is designed to poach viewers  
4 away from authorized cable and satellite companies. *See ibi*, 691 F.3d at 285-86.  
5 These licensed companies may demand concessions from Plaintiffs to make up for  
6 the loss of viewership to unauthorized Internet retransmitters. *See* Brennan Decl.,  
7 ¶¶ 15-17. Moreover, Defendants are able to offer their services at lower prices  
8 than the cable and satellite companies, [REDACTED]  
9 (Shepard Decl., Ex. M (184:14-19, Depo. Ex. 4)), because Defendants do not pay  
10 licensing fees or incur costs necessary to comply with quality and security controls  
11 that Plaintiffs' require of their licensees. *See WTV Systems*, 824 F. Supp. at 1013.  
12 In this way, Defendants' bootleg service harms Plaintiffs' legitimate licensees and  
13 damages Plaintiffs' goodwill with those licensees, which further impairs Plaintiffs'  
14 positions in retransmission consent negotiations. *See WTV Systems*, 824 F. Supp.  
15 1012-13 (unlicensed Internet streaming of copyrighted videos "jeopardized the  
16 continued existence of Plaintiffs' licensees' businesses" and harm plaintiffs'  
17 goodwill with its licensees). *See also*, Brennan Decl., ¶¶ 15-17.

18 ***Interference With Lawful Internet Television Distribution.*** FilmOnX also  
19 threatens to interfere with Plaintiffs' ability to develop a successful and lawful  
20 market for Internet distribution of television programming. Plaintiffs license a  
21 variety of entities, including Hulu (which licenses content from Fox, NBC and  
22 ABC for distribution over Hulu.com) and Apple (which licenses content from all  
23 four networks for distribution through iTunes), to distribute programming over the  
24 Internet on a time-delayed basis. Brennan Decl., ¶¶ 18-20. Defendants'  
25 unauthorized streaming of Plaintiffs' content over FilmOnX, before these licensees  
26 are allowed to make the programming available, could undercut the value of the  
27 programming to these legitimate services, represents unfair competition with these  
28 legitimate services, damages Plaintiffs' goodwill with these licensees, and puts



1 their licensing relationships at risk. *WTV Systems*, 824 F. Supp. 1012-13.

2 Moreover, the presence of Defendants' service in this nascent market threatens the  
3 development and acceptance of those services by confusing consumers, including  
4 about when and whether payment is required to watch Plaintiffs' programs on the  
5 Internet. Unless enjoined, Aereokiller will create incorrect, but lasting impressions  
6 about what constitutes lawful Internet distribution of Plaintiffs' broadcasts. *Id.*

7 ***Undermining Plaintiffs' Own Websites.*** FilmOnX's unauthorized  
8 retransmission includes a large volume of programming that Plaintiffs themselves  
9 make available on their own websites and through other Internet and mobile  
10 television offerings. All four networks maintain websites over which they offer  
11 certain programming. In addition, Fox and NBC Universal have, as part of a joint  
12 venture (with others) called Dyle.tv, launched their own mobile television  
13 application. Brennan Decl., ¶¶ 18, 22. ABC's affiliated companies make their  
14 programming available through the "Watch" Internet services and ABC will be  
15 doing the same. *See id.* By stealing Plaintiffs' copyrighted programming and  
16 using it to enter the Internet streaming market in direct competition with Plaintiffs,  
17 Defendants threaten to undermine Plaintiffs' choices about how and when to show  
18 their programming on the Internet, their opportunities to engage in marketing and  
19 demographic research, and to develop closer connections with viewers, and the  
20 substantial investments they have made in the development of this emerging  
21 market. *Id.* ¶¶ 18, 21-23. Courts have recognized all of these consequences as  
22 irreparable harms. *See WTV Systems*, 824 F. Supp. at 1014; *accord, ibi*, 691 F.3d  
23 at 285-86.

24 ***Destruction of Value in Network Advertising.*** FilmOnX also threatens to  
25 undermine Plaintiffs' positions in negotiations with television advertisers by  
26 siphoning viewers from traditional distribution channels measured by Nielsen  
27 ratings, which are the only viewership measurements relied upon by advertisers in  
28 determining what to pay for advertising. Brennan Decl., ¶ 10. This loss of

1 measured viewers impacts both the value of network advertising, and the  
 2 willingness of major advertisers to invest in it. If ratings are artificially deflated,  
 3 because viewers are not measured, advertisers could simply choose other outlets or  
 4 media. Advertising is critical to Plaintiffs' ability to develop and acquire  
 5 programming. *Id.* ¶ 8. Indeed, "[b]roadcast television stations and networks earn  
 6 most of their revenues from advertising." *ivi*, 691 F. at 285. Given the  
 7 significance of advertising to network business models, the harm that unauthorized  
 8 streaming causes to Plaintiffs' ability to negotiate with advertisers has been  
 9 recognized as irreparable. *Id.*; *Aereo*, 2012 WL 2848158, at \*22.

10 ***Loss of Control Over Content and Threat of Viral Infringement.*** By  
 11 distributing Plaintiffs' programming over the Internet without Plaintiffs having any  
 12 say about the use of security and copy protection measures, Defendants expose  
 13 Plaintiffs to virtually unlimited piracy, in addition to that already committed over  
 14 FilmOnX. Once digital copies are available and released on the Internet, vast viral  
 15 infringement routinely follows. For this reason, when Plaintiffs license their  
 16 broadcasts for digital distribution, they contractually require distributors to adopt  
 17 security measures to prevent piracy. Plaintiffs also impose quality control  
 18 measures to assure the quality of the viewing experience when consumers watch  
 19 network programming. Brennan Decl., ¶ 25. By contrast, Plaintiffs have no ability  
 20 to assure that Defendants or those who copy network programming from FilmOnX  
 21 are doing anything to prevent further piracy or to assure the quality of  
 22 retransmissions. *See WTV Systems*, 824 F. Supp.2d at 1013-14.

23 In addition to these serious harms to Plaintiffs' legal interests, several other  
 24 considerations support a finding of irreparable harm here. *First*, the potential harm  
 25 posed by a service like FilmOnX, if it is allowed to continue unabated, is only  
 26 likely to increase. [REDACTED]

27 [REDACTED]. Shepard Decl., Ex  
 28 M (256:25-257:15). That number appears set to grow significantly in the near

1 future. Defendants recently broadened their potential user base by deploying  
 2 FilmOnX apps that are compatible with iPhones, Android Phones, the newly  
 3 launched Windows 8 operating system and Facebook. *Id.* ¶¶ 2, 12, 17 Exs. C, D,  
 4 K.<sup>14</sup> [REDACTED]. *Id.* Ex. M (169:23-  
 5 170:12, Depo. Ex. 4). The FilmOnX app will also soon be distributed to “tens of  
 6 millions” of additional users through an agreement with Lenovo, the world’s  
 7 leading PC manufacturer, to pre-load the app onto Lenovo computers. *Id.* Ex. C,  
 8 Ex. M (186:21-188:16, Depo. Ex. 4). In the six cities where FilmOnX is available,  
 9 Defendants already have the potential to distribute their unauthorized  
 10 retransmissions to over 18 million viewers.<sup>15</sup> Not only will the new apps help  
 11 them reach more of these viewers, but Defendants also plan to expand to new  
 12 cities, thereby further increasing their user base and the potential harm they can  
 13 inflict on Plaintiffs’ intellectual property and their business relationships. *See*  
 14 *WTV Systems*, 824 F. Supp.2d at 1014 (finding that irreparable harm existed  
 15 because defendants’ service was scalable to support millions of customers).

16 *Second*, Defendants’ illegal distribution model could easily be copied by  
 17 others, just as Defendants themselves copied earlier unauthorized, Internet  
 18 retransmission services. *See ibi*, 691 F.3d at 28. The potential impact of an

19  
 20 <sup>14</sup> Upon learning of FilmOnX’s app deployment, Fox filed copyright infringement  
 21 notices with Apple, Microsoft and Google asking them to stop further distribution  
 22 of the infringing Internet “apps.” Fox believes that these outlets (many of whom  
 23 are Fox’s partners in other ventures) were unaware of Aereokiller’s illegal  
 24 streaming, and they have agreed. The applications, however, still remain on the  
 25 devices upon which they have already been downloaded. At various times,  
 26 Defendants have stopped streaming one or more of Plaintiffs’ local channels on or  
 27 more of their websites or apps only to resume the unauthorized streaming without  
 28 notice. Shepard Decl., ¶ 8. Plaintiffs should not be subject to the whims of  
 Aereokiller and a preliminary injunction should be issued. Moreover,  
 Aereokiller’s counsel has refused to confirm that Aereokiller will not resume  
 streaming Fox broadcast channels. Shepard Decl., ¶¶ 20-22.

<sup>15</sup> According to a recent press release, FilmOnX is currently available to 5.6  
 million people in the Los Angeles market alone. Shepard Decl., ¶ 4, Ex. A.  
 Adding the populations of the other five major metropolitan areas where  
 Defendants’ service is available (Chicago, San Francisco, New York, Minneapolis  
 and Dallas) the audience numbers exceed 18 million. *Id.* ¶ 4, Ex. B.

1 explosion of unauthorized streaming websites on Plaintiffs' intellectual property  
 2 and their distribution and advertising models plainly constitutes a threat of  
 3 irreparable harm. *Id.*

4 *Third*, the harms that Defendants' service threatens to inflict on the value of  
 5 Plaintiffs' programming and advertising and the goodwill they have developed  
 6 with their business partners and consumers are irreparable because they are  
 7 "neither easily calculable, nor easily compensable." *WTV Systems*, 824 F. Supp.  
 8 2d at 1013 (citing *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1066  
 9 (N.D. Cal. 2000)). As the District Court in *Aereo* acknowledged in finding that the  
 10 plaintiff broadcasters and copyright holders in that case would be irreparably  
 11 harmed in the absence of an injunction (which it determined it was otherwise  
 12 "constrained" to deny under the *Cablevision* decision), "[h]arm of this sort has  
 13 been accepted as irreparable based, at least in part, on the difficulty of . . .  
 14 quantifying such damages." *Aereo*, 2012 WL 2848158, at \* 11 and 22.

15 *Finally*, Defendants' likely inability to compensate Plaintiffs for the  
 16 substantial damages that are accruing as a result of the massive infringement that is  
 17 occurring over FilmOnX further supports a finding of irreparable harm. *ivi*, 691  
 18 F.3d at 286. Plaintiffs are entitled to recover statutory damages of up to \$150,000  
 19 per copyrighted work infringed for Defendants' willful infringement of their  
 20 copyrights over FilmOnX. *See* 17 U.S.C. § 504(c)(2). Defendants currently  
 21 stream dozens of network-owned programs every day. Defendants only recently  
 22 launched FilmOnX, and as startup companies, are unlikely to be able to satisfy the  
 23 massive statutory damage award that may result if they are held liable for such  
 24 extensive infringement. [REDACTED]

25 [REDACTED]. Shepard Decl., Ex.  
 26 M (144:7-13, 153:6-155:2, 195:6-197:5, 200: 22-201:5, Depo. Exs. 3, 4).  
 27 Accordingly, monetary damages are likely to be insufficient and an injunction  
 28

1 should issue. *ivi*, 691 F.3d at 286; *Rosen Entm't Sys., LP v. Eiger Vision*, 343 F.  
2 Supp. 2d 908 (C.D. Cal. 2004).

3 In *ivi*, the Second Circuit had no trouble concluding, based on the multiple,  
4 irreparable harms outlined above, that unauthorized Internet streaming of network  
5 broadcasts “would drastically change the industry, to plaintiffs’ detriment.” *ivi*,  
6 691 F.3d at 286. As a result, the Court concluded:

7 The absence of a preliminary injunction would encourage current and  
8 prospective retransmission rights holders, as well as other Internet services,  
9 to follow *ivi*’s lead in retransmitting plaintiffs’ copyrighted programming  
10 without their consent. The strength of plaintiffs’ negotiating platform and  
11 business model would decline. The quantity and quality of efforts put into  
12 creating television programming, retransmission and advertising revenues,  
13 distribution models and schedules – all would be adversely affected. These  
14 harms would extend to other copyright holders of television programming.  
Continued live retransmission of copyrighted television programming over  
the Internet without consent would thus threaten to destabilize the entire  
industry. *Id.*

15 The same is true of Defendants’ unauthorized Internet streaming service in  
16 this case. It threatens Plaintiffs’ intellectual property and their distribution and  
17 advertising models with irreparable harm and should be enjoined. *ivi*, 691 F.3d at  
18 284; *Salinger*, 607 F.3d at 81.

### 19 **C. The Balance Of Harms Tips Decidedly In Favor Of An Injunction**

20 Defendants “cannot complain of the harm that will befall [them] when  
21 properly forced to desist from [their] infringing activities.” *Triad Sys. Corp. v.*  
22 *Southeast Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995); *see also Cadence*  
23 *Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir. 1997) (“[w]here the  
24 only hardship that the defendant will suffer is lost profits from an activity which  
25 has been shown likely to be infringing, such an argument in defense merits little  
26 equitable consideration”). Because a copyright infringer’s complaint that ceasing  
27 its infringing conduct will harm its business is insufficient to defeat a request for a  
28 preliminary injunction, and because Defendants’ business is clearly built upon



1 copyright infringement, the harms tip decidedly in Plaintiffs' favor.

2 Moreover, Defendants' have publicly professed that Plaintiffs' programming  
3 is unimportant to the FilmOnX service: "We have better things to do than screw  
4 around with aging, irrelevant, free to air TV that they can't even give away."  
5 Shepard Decl, Ex. R and Ex. M (131:9-133:8, Depo. Ex. 2). Thus, by their own  
6 admission, enjoining their unauthorized retransmission of Plaintiffs' programming  
7 will not cause them any meaningful harm.

#### 8 **D. The Public Interest Favors An Injunction**

9 The Supreme Court has made clear that upholding copyright protection is in  
10 the public interest. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003); *Nintendo of*  
11 *Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1038 (9th Cir. 1994) ("public  
12 policy favors the issuance of injunctions in intellectual property infringement  
13 lawsuits"). The *ivi* court recently reaffirmed the strong public interest in protecting  
14 a copyright holder's exclusive interests and a "public interest in rewarding and  
15 incentivizing creative efforts." 691 F.3d at 288. The court explained that the  
16 "public has a compelling interest in protecting copyright owners' marketable rights  
17 ... and the economic incentive to continue creating television programming"  
18 because, without these protections, the "store of knowledge" may be diminished,  
19 and "encouraging the production of creative work ... ultimately serves the public's  
20 interest in promoting the accessibility of such works." *Id.*

21 In a holding directly applicable to this case, the *ivi* court concluded that  
22 "Plaintiffs are copyright owners of some of the world's most recognized and  
23 valuable television programming," concluded plaintiffs' works "provide[] a  
24 valuable service to the public, including, *inter alia*, educational, historic and  
25 cultural programming, entertainment, an important source of local news critical for  
26 an informed electorate, and exposure to the arts," and cautioned that if their works  
27 could be copied and streamed over the Internet against their will, their "desire to  
28 create original television programming surely would be dampened." *Id.* Here, as

1 in *ivi* and the other cases cited above where infringement has been enjoined, the  
 2 public interest strongly favors an injunction and protecting the Plaintiffs' rights in  
 3 their valuable television programming.<sup>16</sup>

#### 4 **IV. CONCLUSION**

5 Plaintiffs respectfully request the Court grant their request for a preliminary  
 6 injunction.

7  
 8 Dated: November 8, 2012

JENNER & BLOCK LLP

9  
 10 By: /s/

11 Richard L. Stone

12 Attorneys for Plaintiffs  
 13 Fox Television Stations, Inc., Twentieth  
 14 Century Fox Film Corp., and Fox  
 15 Broadcasting Company, Inc.

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 22 <sup>16</sup> What will likely happen to original broadcast programming if an injunction is  
 23 not issued will disserve the public interest. As *ivi* recognized, where programming  
 24 is copied and streamed over the Internet against the copyright holder's will, the  
 25 desire to create original television programming for broadcasting over-the-air will  
 26 be diminished. 691 F.3d at 288. Hence, a risk exists that less broadcast  
 27 programming will be created. And, to the extent that original programming  
 28 continues to be developed by Plaintiffs, such programming will likely be placed on  
 a cable channel where its value may be fully realized and will no longer be  
 available to the 54 million people who rely on broadcast television. See Brennan  
 Decl., ¶¶ 5, 13, Ex. B. Such an outcome is contrary to the public interest. See  
*Satellite Broad. And Comm. Ass'n v. F.C.C.*, 275 F.3d 337, 343 (4th Cir. 2001)  
 (upholding the importance of "free television for those not served by satellite or  
 cable").